

Local 624, United Brotherhood of Carpenters and Joiners of America, AFL-CIO and T. Equipment Corporation and C.R.C. Co., Inc. and Local 721, Laborers International Union of North America, AFL-CIO. Case 1-CD-968

October 30, 1996

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND HIGGINS

The charge in this Section 10(k) proceeding was filed November 14, 1995, by James F. Grosso, attorney at law, who represents the Employers, T. Equipment Corporation (T. Equipment) and C.R.C. Co., Inc. (CRC). An amended charge was filed on December 1, 1995. The charge alleged that the Respondent, Local 624, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Carpenters), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing T. Equipment and CRC to assign certain work to employees represented by the Carpenters rather than to employees represented by Local 721, Laborers International Union of North America, AFL-CIO (Laborers). The hearing was held on March 27 and April 24, 1996, before Hearing Officer Don C. Firenze. The Employers and the Laborers have filed posthearing briefs.

The National Labor Relations Board affirms the hearing officer's rulings, and finds them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

CRC, a Massachusetts corporation, is engaged in building, heavy highway, and marine construction. Annually it does work valued in excess of \$50,000 outside Massachusetts. T. Equipment, a Massachusetts corporation, is engaged in heavy highway and bridge construction. Annually it purchases and receives goods and materials valued in excess of \$50,000 which are shipped directly from points outside Massachusetts. The parties stipulated, and we find, that the Employers are engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Carpenters and the Laborers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute

CRC and T. Equipment are subcontractors to J. F. White Contracting Company. J. F. White, CRC, and T. Equipment have been constructing seven new railroad stations and renovating railroad bridges for a commuter rail line extension known as the Old Colony

Railway which will run from Braintree, Massachusetts, to Plymouth, Massachusetts. CRC's subcontract entailed building the substructural concrete foundation for the railroad stations. The subcontract with T. Equipment entailed bridge repair and related structural work on the rail system. Both subcontracts required extensive concrete work. The casting of concrete involves the construction of wood or metal forms, pouring concrete into the forms, and, when the concrete has attained sufficient strength, dismantling or stripping the forms from the concrete. The Employers both used reusable metal or plywood panel forms in this process.

CRC and T. Equipment corporation began performing work at a railroad station in Weymouth, Massachusetts, around the beginning of May 1995. Until late June, most of CRC's work at the Weymouth station involved the placing of concrete footings. CRC's crew for this work consisted of two carpenters and two laborers. The carpenters erected forms for the footings and stripped the forms after the concrete hardened. The laborers cleaned and oiled the forms, and carried them to the next point of erection. On several occasions in early June, however, the laborers assisted the carpenters in stripping the forms. In late June, the carpenters complained to CRC's laborer foreman, Jeff Brogeshini, that the stripping should be done by carpenters only, while laborers complained that stripping should be done with at least 50-percent laborers. Brogeshini reported the complaints to Carolyn Cashman-Skaves, the president of CRC. About the last week of June, CRC began pouring concrete for retaining walls. The retaining walls were much larger than the footings. As the work increased, CRC added two carpenters and two laborers to its crew. Around the same time, Laborers' business manager, Louis Palavanchi, demanded that Cashman-Skaves make an official assignment of the work of stripping forms to a crew consisting of half carpenters and half laborers. Palavanchi also contacted Richard Johnson, general manager of T. Equipment, and demanded that T. Equipment make a formal assignment of the work. On June 30, Cashman-Skaves formally assigned the work of erecting and stripping of panel forms to Carpenters-represented employees and the work of cleaning, oiling, and hauling to Laborers-represented employees. Johnson made the same assignment for employees of T. Equipment. On July 5, the next day of work, CRC's carpenters began to strip forms on one of the first retaining walls. Two laborers mounted the wall and began to assist in the strip. Laborer Foreman Brogeshini directed the laborers to come down. They did not dismount the wall, however, and the carpenters refused to continue stripping. The police were summoned and the laborers were escorted from the jobsite.

The Laborers filed a contractual grievance against both CRC and T. Equipment alleging breach of the Laborers' Heavy and Highway collective-bargaining agreement. The first arbitration hearing was scheduled in early November. By telephone calls placed on November 9, Richard Nihtila, assistant business agent for the Carpenters, advised CRC and T. Equipment that if they displaced the carpenters on the strip operation, the carpenters would be pulled from the site, and the Union would no longer refer employees to CRC or T. Equipment. The Employers thereafter filed the charge in this case.

B. Work in Dispute

The work in dispute involves the stripping of concrete forms on the Employers' jobsites on the Old Colony Railway project.

C. Contentions of the Parties

The Employers contend that there is reasonable cause to believe that the Carpenters violated Section 8(b)(4)(D) of the Act. The Employers further contend that the work in dispute should be assigned to employees represented by the Carpenters on the basis of their own, industry, and area past practices; collective-bargaining agreements; relative skills and safety; and the economy and efficiency of operations. The Employers also contend that this issue was previously litigated and decided. In this regard, the Employers point out that in *Laborers Local 721 (Hawkins & Sons)*, 288 NLRB 1246 (1988), involving the same local unions, the Board made an areawide award of the disputed work to the employees represented by the Carpenters. The Employers also maintain that the Laborers has presented no evidence of changed circumstances that would necessitate reexamination of the Board's earlier decision.

The Carpenters appeared only on the first day of the hearing, and left the hearing prior to stating any position.

The Laborers contends that there is no reasonable cause to believe that Section 8(b)(4)(D) has been violated. It argues that the Carpenters' threats were the result of collusion with the Employers, there has been no disruption over the assignment of the disputed work since the second week of July, and the Laborers has never threatened or coerced the Employers or used other proscribed means in order to acquire the disputed work. It also states that their contractual grievances against the Employers did not constitute a claim to the work in dispute, because they seek only back wages and not a reassignment of the work. If the Board finds that a jurisdictional dispute exists, the Laborers maintains that the factors of industry and area past practice, collective-bargaining agreements, and a 1965 agreement of the International Unions favor an award of the

work in dispute to a composite crew consisting of at least 50-percent laborers. The Laborers also contends that the Board's earlier decision in *Local 721* should not have any effect on the instant dispute, inasmuch as the Laborers did not participate in the hearing in that case and the Laborers, the General Counsel, and the employers involved there subsequently entered into a settlement agreement providing that the decision would not be enforceable after 1990.

D. Applicability of the Statute

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed on a method for the voluntary adjustment of the dispute. The Board requires that there be reasonable cause to believe (1) that a labor organization has used proscribed means to enforce its claim to the work in dispute, and (2) that there are competing claims to the disputed work between rival groups of employees.

On November 9, 1995, Nihtila clearly claimed the work in dispute and threatened action, specifically including coercion by a work stoppage, if the Employers displaced the carpenters performing that work. Furthermore, the record reveals that on July 5, employees represented by the Laborers caused a general work stoppage on both the CRC and T. Equipment sites through their attempt to enforce their claim to the disputed work. The Laborers also made oral claims for the work to the Employers' officials in June. As noted above, the Laborers contends that the Carpenters' threat was not a threat within the meaning of Section 8(b)(4)(D), because the threat resulted from collusion between the Employers and the Carpenters. We find no merit in the Laborers' contention. Nihtila's statements to the Employers on November 9 on their face constitute threats and there is insufficient evidence to conclude that the threats were not made seriously or that the Carpenters colluded with the Employers in the matter. See *Operating Engineers Local 3 (Levin-Richmond Terminal)*, 299 NLRB 449, 451 (1990). In these circumstances, we find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred.

The Laborers also contends that the circumstances of this case favor deference to the grievance-arbitration process. It notes that there is a voluntary method for the adjustment of this dispute under the terms of the Laborers' Heavy and Highway agreement to which both Employers are signatory. The Carpenters, however, is not a party to that agreement, and, although it has been invited to participate in the pending arbitration of the Laborers' grievances against the Employers, it has indicated an unwillingness to do so. Accordingly, there is no voluntary method of resolving the ju-

jurisdictional dispute that would be binding on all the parties.

Having found that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no-agreed method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act, we conclude that the dispute is properly before the Board for determination.¹

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of the dispute.

1. Certifications and collective-bargaining agreements

There are no certifications in the record applicable to the Employers' employees represented by either Union. CRC and T. Equipment are signatory to current collective-bargaining agreements with both the Carpenters and the Laborers, either through membership in the Associated General Contractors of Massachusetts, Inc. or the Labor Relations Division of the Construction Industries of Massachusetts. The applicable Carpenters' agreement Article I Recognition—Trade Autonomy—*Words and Phrases Defined*, states that the trade autonomy of the Carpenters shall include "The making, setting, and stripping of all forms used in concrete work, including jacking of slip forms." The applicable Laborers' agreement at Article XXVIII—Concrete, Bituminous Concrete and Aggregates subsection (e) states that the Employer acknowledges the Union's claim of trade autonomy over "the stripping of forms, other than panel forms which are to be re-used in their original form, and the stripping of forms on all flat arch work." It is undisputed that the forms used by

CRC and T. Equipment on the Old Colony Railway Project are panel forms which are to be reused. We therefore find that this factor favors an award of the work in dispute to employees represented by the Carpenters.

2. Agreements between the Unions

In 1963, the International Unions of the Laborers and the Carpenters executed a jurisdictional memorandum of understanding. In relevant part, the memorandum stated: "9. The stripping of all flat arch work, in its entirety, shall be done by the Laborers. The stripping of metal pans leaving a flat surface shall be the work of the Laborer[s]. The Carpenter[s] shall strip in its entirety all foundation walls, columns, beam bottoms, and beam sides, and metal dome pans. The cleaning, oiling and carrying to the next point of erection is the Laborers' work." The agreement was amended in 1965 to read "9. All stripping shall be done by a composite crew of an equal number of Carpenters and Laborers. The cleaning, oiling and carrying to the next point of erection is the Laborers' work." It is undisputed that the Unions did not abide by the memorandum of understanding. Furthermore, we note evidence that the Laborers withdrew from the agreement prior to 1970. Accordingly we find that this factor does not favor an award of the disputed work to employees represented by either Union.

3. Company preference and past practice

It is clear that the Employers prefer to assign the work in dispute to employees represented by the Carpenters. CRC President Cashman-Skaves testified that since she began the Company in 1979 she has always assigned the work in dispute to employees represented by the Carpenters. Richard Johnson of T. Equipment testified that T. Equipment had been assigning the stripping of concrete forms exclusively to Carpenters-represented employees for the 20 years he has worked for the Company. Joe Pasquarella, general superintendent for T. Equipment, testified that on only three jobs in the past 17 years has the Employer assigned stripping to Laborers-represented employees. The three jobs were all within the jurisdiction of Laborers Local 721. On these jobs, stripping was performed by a crew consisting of 50-percent carpenters and 50-percent laborers. He indicated, however, that T. Equipment's usual practice is to assign all stripping work to carpenters. Although there appears to have been a few isolated instances in which T. Equipment assigned the disputed work to laborers, the overwhelming practice of both Employers has been to assign such work to carpenters. Accordingly, we find that this factor favors an award of the disputed work to employees represented by the Carpenters.

¹ We reject the Laborers' contention that the dispute is moot. It asserts that the Employers gave assurances in response to the Carpenters' threat that they would not reassign the disputed work. We conclude that any reassurances given by the Employers are insufficient to negate the possibility that they might change the assignment if an arbitrator finds merit in the Laborers' grievance and concludes that the work assignment violated the Laborers' Heavy and Highway collective-bargaining agreement. The Laborers further contends that the work is complete or nearly complete. It is well established that the mere fact that disputed work has been completed does not render a jurisdictional dispute moot where nothing indicates that similar disputes are unlikely to recur. See, e.g., *Operating Engineers Local 150 (Martin Cement)*, 284 NLRB 858, 860 fn. 4 (1987). There is no indication here that similar disputes will not occur in the future.

4. Area and industry practice

Cashman-Skaves and Johnson testified that the industry practice during their many years of experience in the construction industry has been for employees represented by the Carpenters to perform stripping work. Charles Goodspeed, assistant business manager for Carpenters Local 424, testified that during his 36 years in the construction industry and as a member of the Carpenters, the stripping of concrete forms has always been done by carpenters. Jeff Brogessini, laborer foreman for CRC, also testified that throughout the area, the stripping of concrete forms has consistently been done by carpenters. Laborers Business Manager Louis Palavanchi testified, however, that in Laborers Local 721's jurisdiction, the stripping of concrete forms has been performed with a composite crew of 50-percent laborers and 50-percent carpenters. Palavanchi testified concerning a number of construction projects in which this practice was maintained. In light of the conflicting partisan testimony, this factor does not support an award of the work in dispute to either group of employees.²

5. Relative skills and safety

Both Employers, through their representatives, stated their belief that because the carpenters erect the forms, they are more adept than laborers at removing them. They also testified that carpenters individually own the necessary tools, including hammers, catpaws, pry bars, wrenches, and screwdrivers, whereas laborers do not customarily possess these tools. Cashman-Skaves further testified that the improper handling of forms could seriously injure employees, as well as damage the con-

crete, and the forms themselves. Johnson testified that the forms cost approximately \$200 per panel and are generally reused up to 20 times. We find that the factor of relative skills and safety supports an award of the work to employees represented by the Carpenters.

6. Economy and efficiency of operations

Johnson and Cashman-Skaves testified that it is more economical and efficient to use only employees represented by the Carpenters to perform both the erecting and the stripping of forms which are to be reused. They indicated that if they were required to utilize a laborer for every carpenter stripping forms, half of the Carpenters-represented employees would be idle during the process. We find that the factor of economy and efficiency of operations favors an award of the disputed work to the employees represented by the Carpenters.

Conclusion

After considering all the relevant factors, we conclude that employees represented by the Carpenters are entitled to perform the work in dispute. We reach this conclusion relying on the factors of collective-bargaining agreements, company preference and past practice, relative skills and safety, and economy and efficiency of operations. In making this determination, we are awarding the work to employees represented by the Carpenters, not to that Union or its members. The determination is limited to the project known as the Old Colony Railway.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of T. Equipment Corporation and C.R.C. Co., Inc. represented by Local 624, United Brotherhood of Carpenters and Joiners of America, AFL-CIO are entitled to perform stripping of reusable panel forms on the Old Colony Railway project.

²The Laborers contends that the hearing officer improperly excluded evidence that composite crews had been performing the disputed work prior to the Board's decision in *Laborers Local 721 (Hawkins & Sons)*, 288 NLRB 1246 (1988). We find that it is unnecessary to determine whether the hearing officer erred in excluding the evidence, because it would not affect our evaluation of the area and industry practice in light of the substantial contrary evidence presented by the Employers.